**TAC CONSTRUCTION & TRADING**

**v.**

**BENNES ENGINEERING BHD (NO 2)**

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-313-1998]
28 JANUARY 1999

***CIVIL PROCEDURE:*** *Execution - Stay - Considerations - Special circumstances - Disputing correctness of a judgment - Whether a special circumstance*

***CIVIL PROCEDURE:*** *Stay of proceedings - Winding-up proceedings - Whether prayer for stay of winding-up proceedings may be included in application for stay of execution - Whether stay of winding-up proceedings must be applied for by way of originating summons - Whether improper to apply for stay of winding-up proceedings in summons-in-chambers seeking stay of execution - Whether application for stay of winding-up proceedings tantamount to application for injunctive relief*

The plaintiff, having obtained summary judgment against the defendant for the sum of RM325,229.16, issued a statutory notice of demand under s. 218(2)(a) of the Companies Act 1965 ('the Act'). The defendant then filed a summons-in-chambers seeking a stay of execution, including a stay of further proceedings under the plaintiff's s. 218 notice, pending the disposal of the defendant's appeal to the Court of Appeal. Alternatively, the defendant sought the order of stay on terms that the defendant deposited the judgment sum together with interests in an interest-bearing account with the court pending the disposal of the appeal.

**Held:**

**[1]** Proceedings in bankruptcy or for the winding-up of a company do not fall within the ambit of proceedings by way of execution or writs of execution. The defendant could not be permitted to include a prayer for a stay of winding-up proceedings in its application for a stay of execution. An application for a stay of winding-up proceedings must be made by way of an originating summons. It was wholly improper for the defendant to apply by way of a summons-in-chambers for a stay of winding-up proceedings contemporaneously with an application for a stay of execution.

**[2]** The defendant's purported application for a stay of winding-up proceedings was tantamount to an application for injunctive relief as no winding-up proceedings had been commenced by the plaintiff. And, as more than three weeks had elapsed since the service of the plaintiff's statutory notice of demand, the defendant was not legally entitled and could not be permitted to apply for injunctive relief against the plaintiff from proceeding with any winding-up proceedings in the future. The defendant had failed to disclose any grounds to support its request for injunctive relief; it had failed to provide any undertaking as to damages in respect of injunctive relief.

**[3]** The court is not a collection agency nor a deposit-taking institution; it is not a bank. There are no legal provisions that allow the court to grant interests in respect of moneys paid into court by virtue of court orders.

**[4]** Two approaches have been adopted by the courts in respect of applications for a stay pending appeal; the 'special circumstances' approach and the 'nugatory approach'. What constitutes a special circumstance is beyond definition and its parameters are wide; it is the judge who determines, on the facts, what are special circumstances. Challenging the validity or correctness of a judgment cannot be construed as a special circumstance to warrant a stay.

**[5]** The permanent deprivation of moneys paid, or that the defendant would not be restored to its original position, or difficulty in recovering moneys from the plaintiff, or that the plaintiff would not be in a position to reimburse the defendant – did not amount to special circumstances even if the defendant succeeded on appeal.

**[6]** There is no proposition of law that pending an appeal, a defendant is permitted to refuse to pay a plaintiff moneys under the judgment sum by reason of the failure of the plaintiff to prove its solvency.

*[Defendant's application dismissed.]*

**Case(s) referred to:**

*A-G v. Albany Hotel Co [1896] 2 Ch 696* ***(cit)***
*A-G v. Emerson [1890] 24 QBD 56* ***(refd)***
*Allen v. Jambo Holdings Ltd [1980] 2 All ER 502* ***(cit)***
*American Cyanamid v. Ethicon [1975] 1 All ER 504* ***(cit)***
*Ban Lee Sdn Bhd v. Renganathan Narayanan [1998] 3 CLJ Supp 426* ***(refd)***
*Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584* ***(refd)***
*Chong Wooi Leong & Ors v. Lebbey Sdn Bhd [1998] 2 CLJ 509* ***(refd)***
*Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 2 CLJ 161* ***(refd)***
*Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701* ***(cit)***

*Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd [1998] 6 MLJ 330* ***(refd)***
*Kumar Jaspal Quah & Aishah v. Wembley Industries Holdings Bhd [1998] 2 CLJ 759* ***(refd)***
*Lebbey Sdn Bhd v. Chong Wooi Leong & Anor [1998] 1 CLJ 1072* ***(refd)***
*Lee Kuan Yew v. Jeyaretnam JB [1991] 1 MLJ 83* ***(refd)***
*Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86* ***(refd)***
*Monk v. Bartram [1891] 1 QB 346* ***(refd)***
*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 96* ***(cit)***
*Penang Port Commission v. Kanawangi Superumaniam [1997] 1 CLJ 423* ***(refd)***
*Perwira Affin Bank Bhd v. Hj Zakaria Hj Ismail & Ors [1998] 2 CLJ 770* ***(refd)***
*Re Foursea Construction (M) Sdn Bhd [1998] 3 CLJ 135* ***(refd)***
*Re Kong Thai Sawmill Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131* ***(refd)***
*Re Mohamad Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783* ***(foll)***
*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299* ***(refd)***
*Sykt Berpakat v. Lim Kai Kok [1983] 1 MLJ 406* ***(refd)***
*Tan Lai Wah v. First National Bank of Chicago [1984] 1 MLJ 150* ***(foll)***
*The Commissioners For Special Purposes Of The Income Tax v. John Frederick Pemsel [1891] AC 531* ***(refd)***
*Tneoh Hong Seng v. Dayani Sdn Bhd [1998] 2 CLJ Supp 79* ***(refd)***
*Toh Kheng Heng & Anor v. Ahmad Fauzi Mohd Taufek [1994] 1 CLJ 547* ***(refd)***
*Wilson v. Church (No 2) [1879] 12 Ch D 454* ***(refd)***
*Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 218(1)(e), (2)(a), 222
Courts of Judicature Act 1964, ss. 73, 102
Evidence Act 1950, ss. 2, 114(g)
Rules of the High Court 1980, O. 56 r. 1(4), O. 88 r. 2(1)

**Other source(s) referred to:**

*Execution Of A Judgment*, JF Josling, pp 149-150
*Halsbury's Laws of England*, 4th edn, vol 17, p 272, para 455

*For the plaintiff - Teh Ann Tong; M/s HY Lee & Hee*
*For the defendant - Felix Dorairaj; M/s Dorairaj, Low & Teh*

*Reported by SA Rahim*

## JUDGMENT

**Abdul Malik Ishak J:**

***Preliminary Issues***

Enclosure 36 was a summons in chambers dated 2 September 1998 and filed on 2 October 1998 by the defendant seeking the following prayers:

(i) for a stay of execution proceedings, including a stay of further proceedings under a Notice dated 15th of September 1998 Section 218(2)(a) of the Companies Act, 1965 pending disposal of the Defendant's/Applicant's appeal to the Court of Appeal;

(ii) alternatively, for a stay of execution proceedings including a stay of further proceedings under a Notice dated 15th of September 1998 under Section 218(2)(a) of the Companies Act, 1965 upon the Defendant depositing the judgment sum together with interest in an interest bearing account with this Honourable Court pending the disposal of the Defendant's Appeal to the Court of Appeal;

(iii) costs of this Application to be borne by the Defendant;

(iv) such further or other relief as this Honourable Court shall deem fit.

It is interesting to note that the defendant in encl. 36 sought for an order "for a stay of execution proceedings, including a stay of further proceedings under a Notice dated 15th of September 1998 under s. 218(2)(a) of the Companies Act 1965 ..." The "proceedings under a Notice dated 15 September 1998" relate to a statutory notice of demand dated 15 September 1998 issued by the plantiff's solicitors to the defendant pursuant to s. 218(2)(a) of the Companies Act 1965 which was marked as exh. "AC-2" in encl. 35 – the affidavit in support to encl. 36. For ease of reference that statutory notice of demand is now reproduced verbatim:

15th September, 1998

M/s BENNES ENGINEERING BERHAD,
No. 50, Jalan 10/116B,
Kuchai Entrepreneurs Park,
Jalan Kuchai Lama,
58200 Kuala Lumpur. **BY A.R. REGISTERED**

and/or

Amcorp House, Tingkat 2,
Lot 271, Jalan Dua,
Off Jalan Chan Sow Lin,
55200 Kuala Lumpur. **BY A.R. REGISTERED**

*a* Dear Sirs,

**Re: NOTICE under SECTION 218 (2)(a) of the Companies Act, 1965**

We act for Messrs TAC CONSTRUCTION & TRADING of No. 32, Jalan Harimau Kumbang, Century Garden, 80250 Johor Bahru, Johor Darul Takzim.

*b* Pursuant to **Section 218(2)(a)** of the Companies Act, 1965 we demand payment from you within Twenty-One (21) Days from the date of receipt hereof the sum of RM311,785.31 being the judgment sum pursuant (to) a Judgment dated 19th August 1998 obtained by our client against you *vide* Suit No. 22-313-1998 in the High Court of Malaya at Johor Bahru, particulars whereof are set out as follows:

*c*

| | **Particulars** | **Amount** |
|---|---|---|
| (a) | Judgment sum | RM325,229.16 |
| | LESS | |
| (b) | Payment | RM 20,000.00 |
| *d* | | ---------- |
| | Sub-Total b/d | RM305,229.16 |

Page 2

**Notice under Section 218 (2)(a) - M/s Bennes Engineering Berhad**

*e*

| | | |
|---|---|---|
| | Sub-Total c/f | RM305,229.16 |
| PLUS | | |
| (c) | Interest on RM305,229.16 at 8% per annum calculated from 10/6/98 to 15/9/98 | |
| *f* | (98 Days) and continuing | RM 6,556.15 |
| | | ---------- |
| | Total | RM311,785.31 |
| | | ---------- |

*g* TAKE NOTICE that if you fail or neglect to pay the aforesaid sum or secure or compound for it to the reasonable satisfaction of our client within the aforesaid period, you shall be deemed to be unable to pay your debts and our client shall proceed to apply to the Court to wind-up your company.

Dated this 15th September, 1998.

*h* Yours faithfully,
Sgd (Illegible)

c.c. 1. Client,
Messrs TAC CONSTRUCTION & TRADING.

*i* 2. Malayan Banking Berhad,
14th Floor, Menara Mayban,
100, Jalan Tun Perak,
50050 Kuala Lumpur.

3. The Pacific Bank Berhad,
Ground Floor, Wisma Genting,
28, Jalan Sultan Ismail,
50250 Kuala Lumpur.

Page 3

**Notice under Section 218 (2)(a) – M/s Bennes Engineering Berhad**

c.c. 4. Hong Leong Bank Berhad,
Level 5, Wisma Hong Leong,
18, Jalan Perak,
50450 Kuala Lumpur.

5. EON Bank Berhad,
Corporate Services, Wisma Cyclecarri,
288, Jalan Raja Laut,
50350 Kuala Lumpur.

6. Oriental Bank Berhad,
Bangunan Oriental Bank,
Kuala Lumpur.

and it is now trite law that the failure to comply with the statutory notice of demand issued under s. 218(2)(a) of the Companies Act 1965 would entitle the plaintiff to proceed with the winding-up proceedings against the defendant pursuant to s. 218(1)(e) of the same Act. Inability to pay debts is the most commonly known and relied upon ground for a winding-up order. *Prima facie*, as a creditor the plaintiff has a right to file a petition for winding-up, whatever the motives of the plaintiff be: *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96. At para. 7 of encl. 35, the defendant took exception that the statutory notice of demand was extended to all the defendant's banks and it was alleged that the judgment sum had been dishonestly obtained. Of pertinence to note would be the non-compliance of the defendant to the statutory notice of demand. It can therefore be said that by applying for an order for a stay of execution proceedings including a stay of further proceedings of that statutory notice of demand, the defendant was clearly contemplating a stay of execution proceedings including the "winding-up proceedings" against the defendant. Put in another way, the defendant has construed the "winding-up proceedings" as falling within the ambit of writs of execution and thereby purportedly included a stay of winding-up proceedings in their application for a stay of execution. The very nature of prayer (i) of encl. 36 gave rise to three main issues:

(1) Whether proceedings in bankruptcy or for the winding-up of a company fall within the ambit of proceedings by way of execution or writs of execution;

(2) If the answer were to be in the negative, the next question to pose would be whether the defendant is permitted to include a stay of winding-up proceedings in their application for a stay of execution;

(3) If the answer is also in the negative, the next obvious question to ask would be whether the defendant's application in encl. 36 which seeks for an order that "proceedings under a notice dated 15 September 1998 under s. 218(2)(a) of the Companies Act 1965" is clearly misconceived and would be struck out in limine by this court.

I will now proceed to examine these issues briefly. To answer the first issue, reference to J.F. Josling on *"Execution Of A Judgment"* at pp. 149 to 150 should be referred to. There the learned author said:

> Proceedings in bankruptcy or for the compulsory winding up of a company are not strictly proceedings by way of execution of a judgment.

T. Selventhiranathan J in *Re Mohamad Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783 said at p. 789:

> With respect, bankruptcy proceedings do not fall within the ambit of writs of execution in Order 46: see Vol. 1 of *The Supreme Court Practice* 1982 para 46/2/1 stating that:
>
> > The issue of a bankruptcy notice is not a form of execution (*Re a Bankruptcy Notice* [1898] 1 QB 383 per Chitty L.J. at page 387). Nevertheless, in practice the Bankruptcy Court requires the fiat of a Master (QBD) before a notice will issue on a judgment more than six years old.
>
> However, this point was considered by Edgar Joseph Jr. J. (now FCJ) in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1989] 3 MLJ 508 where his Lordship stated as follows at pages 509 to 511 of the report:
>
> > First of all, the bankruptcy notice having been issued on 12 May 1988 and served upon the judgment debtor on 9 June 1988 although the judgment debt upon which it was grounded was dated 13 May 1982, it was said that proceedings in bankruptcy had been commenced more than six years after judgment had been recovered, without leave of the court as required under Order 46 rule 2(1) of the Rules of the High Court, 1980. The case of *Re v. Gopal, ex p Bank Buruh (M) Bhd* [1987] 1 CLJ 602 was cited in support.
>
> Before I embark upon a consideration of the UK decisions, I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment. (See eg *Re A Bankruptcy Notice* [1898] 1 QB 383 per Chitty L.J. at page 386). At most, it seems to me that the issue of a bankruptcy notice may be regarded as a species of practical enforcement.

From these passages, it can safely be concluded that proceedings in bankruptcy or for the winding-up of a company do not fall within the ambit of proceedings by way of execution or writs of execution. This brings me to the second issue and in answering that issue I say that the defendant is not permitted to include a stay of winding-up proceedings in their application for a stay of execution. Consequently, the answer to the third issue would be in the positive in that it is clearly misconceived and this court would not permit it and would strike it down in limine.

In the event my answers to these three issues were wrong, I must now proceed to the next step of inquiry. Now, if it is argued that the defendant has sought for an order for stay of execution and an order for stay of winding-up proceedings, both these two orders being mutually exclusive to one another then the following six nagging issues arise for determination:

(a) If the orders sought for by the defendant are distinct and mutually exclusive of one another, then the question to pose would be whether the defendant should apply for an order for stay of the winding-up proceedings by way of a separate originating summons.

(b) If the answer to question (a) above is in the affirmative, the next question to pose would be whether it is proper for the defendant to apply by way of a summons in chambers for an order for stay of proceedings contemporaneously with the application for an order for stay of execution? This would convert the defendant's application in encl. 36 to be a hybrid form of application that cannot be permitted or allowed.

(c) The next question to pose would be whether the defendant should only apply for a stay of winding-up proceedings after the plaintiff has commenced winding-up proceedings against the defendant.

(d) If the answer to question (c) above is in the affirmative, then the next question to pose would be whether the order sought by the defendant for "stay of further proceedings under a Notice dated 15 September 1998" tantamount to an application for injunctive relief bearing in mind the fact that the plaintiff has not commenced any winding-up proceedings against the defendant at any time.

(e) Again if the answer to question (d) above is in the affirmative, the next obvious question that comes to mind would be whether the defendant is legally entitled to apply for an injunctive relief against the plaintiff from proceeding with any winding-up proceedings in the present case.

(f) In the final analysis, if the answer to question (e) above is in the negative, the question that follows would be whether the defendant's application in encl. 36 which includes an order for "stay of further proceedings under a Notice dated 15 September 1998 under s. 218(2)(a) of the Companies Act 1965" is bad in law and cannot be sustained legally.

In answering query (a) above, I need to refer to O. 88 r. 2(1) of the Rules of the High Court 1980 ("RHC") which says that every application under the Companies Act 1965 must be made by originating summons. Put in another way, an application for a stay of winding-up proceedings must be made by way of an originating summons. This means that in answering query (b) above, it is wholly improper for the defendant to apply by way of a summons in chambers for an order of stay of proceedings contemporaneously with an application for an order for stay of execution as seen in encl. 36.

Generally, for a stay of winding-up proceedings (where a winding-up order has not been made or granted) the Court is duty bound to consider whether the company's financial position is "hopelessly insolvent" meaning that the company is unable to meet the creditors' current demands and that it would be against the interest of the commercial world and morality (all rolled up together) to permit further losses which may never be discharged. In the words of KL Rekhraj J in *Re Foursea Construction (M) Sdn Bhd* [1998] 4 MLJ 99, 103, 104:

> I am also of the view that section 176(1) application gives the court the discretion only if there are no winding-up proceedings initiated prior to the application; and if there are such winding-up proceedings, then any such application must be made in the very winding-up proceedings by making the petitioners and the supporting creditors, if any, as parties thereto; and the presiding judge in the winding-up court would then have before him the wishes of all the creditors or contributories in coming to some conclusion by either making the order for arrangement and/or reconstruction and thus granting a stay under section 222 of the Companies Act; or refuse the application, if satisfied that the company's financial position is one of being a 'hopelessly insolvent', ie it is unable to meet the creditors' current demands and that it would be against the interest of the commercial world and morality to permit further trading losses which may never be discharged; and instead to wind up the company.

On the other end of the scale, for a stay of execution proceedings the court would have to consider whether the applicant has proved special circumstances. In *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353, 355, I did say the following and it should rightly apply to the factual matrix of the present case:

> The above quoted provisions give a leeway for me to exercise my judicial discretion and that discretion must be exercised within the confines of the law. A concerted attempt was made to show the incorrectness of my decision but this surely, with respect, cannot be construed as a special circumstance. Put in another way, the allegations that there have been misdirections in the judgment, that the judgment was against the weight of the evidence or that there was no evidence to support the judgment as advanced by Mr. Robert Lazar, are not special circumstances on which this Court will grant a stay (*Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131). Even an appeal to the Court of Appeal as contemplated by the applicant cannot constitute a special circumstance; what amounts to special circumstances must be something distinctive and out of the way (*Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 2 MLJ 406). In the final analysis, what may amount to special circumstances is certainly a question of fact and it varies from case to case. Lord Esher MR aptly said in *Monk v. Bartram* [1891] 1 QB 346 that:
>
> It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution.

Now, in the present case what the defendant should have done was simply to apply for a stay of winding-up proceedings after the plaintiff has commenced winding-up proceedings against the defendant. Section 222 of the Companies Act 1965 provides the answer; it enacts as follows:

> At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

For the foregoing reasons, I would answer query (d) as follows. The defendant's purported application in encl. 36 to seek for a "stay of further proceedings under a Notice dated 15 September 1998 under s. 218(2)(a) of the Companies Act 1965" tantamounts to an application for an injunctive relief since prayer (i) of encl. 36 cannot be construed either as an application for a stay of execution or for a stay of proceedings as no winding-up proceedings has been commenced by the plaintiff against the defendant.

In the present case more than three weeks (21 days) had elapsed since the service of the statutory notice of demand dated 15 September 1998. Thus, the defendant is not legally entitled nor permitted to apply for an injunctive relief against the plaintiff from proceeding with any winding-up proceedings in the near future. As I said in *Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd* [1998] 6 MLJ 330, 339:

> In my judgment, under section 218(2)(a) of the Companies Act, 1965 if a debtor does not pay within three weeks (21 days) of service of a notice, the creditor is entitled to present a petition and that creditor cannot be restrained by an injunction. At this stage, the debtor cannot say that it is able to pay but chooses not to: *Cornhill Insurance Plc v. Improvement Services Ltd & Ors* [1986] 1 WLR 114.

Flowing from these, the answer to query (e) above is in the negative.

In regard to query (f) above, the inclusion in encl. 36 of an order for "a stay of further proceedings under a Notice dated 15 September 1998 under s. 218(2)(a) of the Companies Act 1965" is, in my judgment, bad in law and cannot be legally sustained. A perusal of encl. 35 – the affidavit in support of encl. 36, shows beyond doubt that the defendant has completely failed to disclose any grounds or merits to support the defendant's request for an injunctive relief. What is more crucial is the failure on the part of the defendant to give or provide any undertaking as to damages in encl. 35 in respect of the injunctive relief. What is the purpose of the undertaking as to damages? It is, in my judgment, to vest the court with the jurisdiction to make the appropriate orders to recompensate the loss suffered by the party when it is subsequently established that the applicant was not entitled to the injunction in the first place. Unless such an undertaking is given by the applicant, the person wrongly enjoined will hardly have any recourse against the applicant (*Attorney-General v. Albany Hotel Co* [1896] 2 Ch 696 at p. 699). On the strength of the *American Cyanamid* case [1975] 1 All ER 504 at p. 510, the ability of the applicant to honour his undertaking is a material factor in the balance of convenience. But the courts are magnanimous for it will not deny the applicant an interlocutory injunction simply because he is of limited financial means (*Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502). Be that as it may, encl. 35 did not show the grounds or merits for the defendant to justify its request for an order for a stay of winding-up proceedings even if this court considers that such an application may be made before any winding-up proceeding has been commenced. At this juncture, it is germane to refer to a passage that appears in the judgment of KL Rekhraj J in *Kumar Jaspal Quah & Aishah (suing as a firm) v. Wembley Industries Holdings Berhad* [1998] 2 AMR 1288, 1290, that reads as follows:

> No doubt the court has the discretionary power under section 222 of the said Act to restrain such act or proceedings, but only if and provided there are merits in the application touching on the dispute, as Parliament had given a creditor, who cannot get paid, an absolute right to presentation of its petition against the company which not only refuses to pay him, but is in a state of statutory insolvency after having failed to comply with the statutory notice under the Act.

Furthermore, the defendant has completely failed to prove in encl. 35 that if a stay of proceedings is not granted, it would be against the interest of the commercial world and morality. At any rate, the defendant is already in a state of statutory insolvency by sheer non-compliance with the statutory notice. Thus, to grant a stay of proceedings would permit the defendant to suffer further losses that may never be discharged.

I will now examine prayer (ii) of encl. 36. It is an alternative prayer "for a stay of execution proceedings including a stay of further proceedings under a Notice dated 15 September 1998 under s. 218(2)(a) of the Companies Act 1965 upon the defendant depositing the judgment sum together with interest in an interest bearing account with this Honourable Court pending the disposal of the defendant's appeal to the Court of Appeal." As I said earlier that the defendant's prayer (i) of encl. 36 for "a stay of further proceedings under a Notice dated 15 September 1998 under s. 218(2)(a) of the Companies Act 1965" has no legal basis whatsoever and the same would equally apply to the defendant's alternative prayer (ii) of encl. 36. To confound the matter further, the defendant has the audacity to include a prayer that "upon the defendant depositing the judgment sum together with interest in an interest bearing account with this Honourable Court." I must at once say that the courts are not a collection agency nor a deposit taking institution. It is not a bank. There are no legal provisions to permit or allow the courts to grant interests in respect of any moneys paid into courts by virtue of court orders. In my judgment, the prayer as envisaged in prayer (ii) of encl. 36 has no legal basis. It was drafted in bad taste. Abdul Kadir Sulaiman J in *Ban Lee Sdn Bhd v. Renganathan Narayanan* [1998] 3 CLJ Supp 426 saw no justification for the sum ordered to be deposited in court pending the outcome of the applicant's intended appeal. Likewise here there was no justification advanced by the defendant for the judgment sum to be deposited in this court.

There is a glaring omission on the part of the defendant to specify in their prayers in encl. 36 the particular court order or judgment where execution proceedings are to be stayed. Even if this court is minded to grant an order for the stay of the execution proceedings, such an order would be ambiguous and uncertain as the particular order or judgment on which execution proceedings are intended to be stayed is not specified with exactitude. Viewed in its correct perspective, encl. 36 should be dismissed in limine with costs to the plaintiff to be assessed. Bad drafting of encl. 36 puts the defendant in a very bad light. Those persons who prepare and are responsible for the language of encl. 36 should have employed a short and simpler language. In the context of legislative drafting, Lord Macnaghten once observed in *The Commissioners For Special Purposes Of The Income Tax v. John Frederick Pemsel* [1891] AC 531, 576:

> But we are not living in Utopia, where a perfect or ideal lawgiver may be had very readily.

I have to be critical of encl. 36 as the choice of words was, with respect, not happily selected. We are not in Utopia but in Malaysia and just like Utopia precision in language comes easily to those who are trained in the legal field.

***Merits Of Encl 36***

Lest I be accused of an oversight, I will now proceed to consider the defendant's application in encl. 36 in a restricted form and focussing my attention to the stay of execution proceedings of the judgment of this court dated 19 August 1998 pending appeal to the Court of Appeal.

Order 56 r. 1(4) of the RHC provides as follows:

> Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

Sections 73 and 102 of the Courts of Judicature Act 1964 in clear language confer on the courts a wide judicial discretion to grant orders for stay of execution of orders or proceedings. That discretion must be exercised judicially in accordance with well established principles and dependent on the circumstances of each case. No two cases are alike. As Lord Esher said in *Attorney-General v. Emerson* [1890] 24 QBD 56, 58 when construing the English Order L VIII, r. 6:

> The real question is, what is the construction of this rule? It says: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct'. In all the rules, the word 'may' has been held to mean 'may or may not'. It has been held to give a discretion, which is called a judicial discretion, but is still a discretion.

Two approaches have been adopted by the courts in respect of an application for stay pending appeal. These two approaches have not been incorporated in the statute books. The first approach would be the special circumstances approach. The second approach is the nugatory approach. I will now examine these two approaches briefly.

***Special Circumstances Approach***

The starting point would be the old English Court of Appeal decision of *Monk v. Bartram* [1891] 1 QB 346 where Lord Esher MR, after a trial, said:

> It was never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances ...

*Halsbury's Laws of England,* vol. 17, 4th edn. at p. 272, para. 455 contains a short interesting passage on the subject matter. It reads as follows:

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

The Federal Court too in two cases adopted the special circumstances approach as can be seen in *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701; [1995] 2 MLJ 105 and *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong* [1995] 2 CLJ 161; [1995] 2 MLJ 119. However, what constitutes a special circumstance is beyond definition. Its parameters are wide. Everything is dependent on the facts of each case. Raja Azlan Shah J (as His Majesty then was) in *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86 made a valiant attempt at defining those words. This was what His Majesty said:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

Of course, it goes without saying that it is the judge that determines, on the facts, what are special circumstances. There must be materials before a judge grants a stay. In *Kerajaan Malaysia v. Dato' Hj. Ghani Gilong (supra)*, the Federal Court disagreed with the decision of the High Court judge who had granted a stay without material. This was what Edgar Joseph Jr. FCJ said at p. 129 of that case:

> We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorized agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No: 2)* [1976] 1 MLJ 131 FC, Lee Hun Hoe CJ (Borneo) delivering the judgment of the court spoke of the same subject matter in this way (see p. 132 of the report):

> It is my view that where stay of execution has previously been refused by this court after a hearing of an appeal lasting over a week, an application made to the same court for stay pending an appeal must be supported by special circumstances. Allegations that there has been misdirections that the verdict of judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment, are not special circumstances on which the court will grant the application. See *Monk v. Bartram* [1891] 1 QB 346. Those are matters to be decided in the proper forum.

The High Court in Penang in *Toh Kheng Heng & Anor v. Ahmad Fauzi bin Mohd. Taufek* [1994] 1 CLJ 547, 554 also applied the special circumstances approach and this was what the learned judge said:

> In my view this by itself was not a special circumstance for me to order a stay of execution. The same argument could be raised in virtually all cases for possession of land under Order 89 where the occupier thereof has to be evicted pursuant to a court order and any building erected thereon consequently demolished. It would therefore lead to a situation where the intention of the legislature in providing for the Order 89 procedure to be adopted to bring summary proceedings for possession of land would be defeated.

***The Nugatory Approach***

Simply put, this approach is to prevent an appeal, if successful, nugatory. Cotton LJ in *Wilson v. Church (No: 2)* [1879] 12 Ch D 454 was concerned about the dissipation of the fund in that case in the event the appeal was successful. At p. 458 of the report this was what his Lordship said:

> ... I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit, they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.

At p. 459 of the report, Brett L.J. succinctly said:

> ... the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory. That being the general rule, the next question is whether, if this fund were paid out, the appeal, if successful, would be nugatory. Now it seems to me that, looking at this matter in the view of men of business, one cannot help seeing that if this fund is paid out it is impossible to say to whom it will be paid. It is quite true that the payments out will be to persons many of whom will never be able to be found, it is very possible, and most likely, that several of them will be abroad; it is most likely that several of them will be in America; and the practical result of paying this money out to the different bondholders, or to the persons who would be holding the bonds at the time, would be that the fund never could be got back again if the appeal were successful.

Recently the Court of Appeal through Gopal Sri Ram JCA adopted the nugatory approach in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598. There his Lordship said at p. 610 of the report:

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under section 44(1) of the Courts of Judicature Act, 1964, is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the *status quo*.

Mahadev Shankar (JCA) (as he then was) in *Penang Port Commission v. Kanawangi s/o Superumaniam* [1997] 1 CLJ 423; [1996] 3 MLJ 427 adopted the nugatory approach as his Lordship felt "that there is a real risk that a successful appeal could be rendered nugatory" (see p. 434 line "F" of the report).

In 1998, the Court of Appeal in *Chong Wooi Leong & Ors v. Lebbey Sdn Bhd (No: 2)* [1998] 2 MLJ 661 again adopted the nugatory approach. Abu Mansor Ali JCA had this to say at p. 672 of the report:

> Mr. Sivarasa for the applicants convinced us that no doubt that applicants' claim is for compensation nonetheless, if we were not to stay the respondent's vacant possession order before the hearing of the applicant's leave to appeal, it is clear the applicants' right to be there would be dissipated and gone before the appellants can have their several claims assessed and determined and their equity would largely have been eroded and destroyed. We were unanimous that to that extent the applicants' appeal would be nugatory. How can it not be so when what is left would be empty fields? We, therefore, allow the applicants' application for a stay of the Court of Appeal order for vacant possession of 20 January 1998 until the disposal of the applicants' application for leave to appeal in the Federal Court with costs of this application in the appeal.

Ahmad Fairuz JCA, in the same case echoed the same sentiments at p. 673 of the report:

> As to the merits of the application, I am of the view that the applicants' premises should be preserved. The destruction of their premises will, as contended in para 9 of their affidavit in support cause them to suffer losses, hardships and difficulties which are irremediable (mengalami kerugian, penderitaan dan kesusahan yang tidak boleh dibaiki). I find no evidence that can show that such contention of the applicants as inherently improbable. Furthermore, the applicants in their counterclaim (see page 121 of the record) have, amongst other things, sought a declaration that they have a right to

> remain on the land in question until their equities are being satisfied in the form of compensation and damages. If a stay is not granted, then, the very grant of vacant possession to the respondent will mean the destruction of that right. From then on, any success in the application for leave to appeal or eventually in the appeal itself will be meaningless as that right can never be restored. Thus, a stay is necessary to ensure that that right would be available to the applicants in the event that the Federal Court decides their application for leave to appeal in their favour. Hence, any refusal to grant the stay would render the application for leave to appeal, or the appeal itself, if the Federal Court allows the application for leave to appeal, nugatory. For these reasons I allow the application of the applicants to the extent that the execution of the order of the High Court Shah Alam shall be stayed forthwith until the disposal of the applicants' application for leave to appeal. Costs is granted as prayed in the application.

Of interest to note would be the dissenting judgment of NH Chan JCA in the same case. At p. 666 his Lordship aptly said:

> In the instant case, leave has yet to be granted by the Federal Court to appeal to that court from the judgment of the Court of Appeal. As there is no appeal which is pending from the Court of Appeal to the Federal Court, there is no justification for the Court of Appeal to stay execution on its judgment from which there is no right to appeal. '... It is absolutely unheard of to stay proceedings upon the judgment of a court from which there is no appeal as of right': said Griffith C.J. in the Australian High Court case of *Mclaughlin v. Daily Telegraph Newspaper Co Ltd (No. 1)* [1904] 1 CLR 243 at page 283.

Across the causeway in Singapore, Yong Pung How J (as he then was) in *Lee Kuan Yew v. Jeyaratnam JB* [1991] 1 MLJ 83 refused the defendant's application for a stay of execution pending appeal and he applied the special circumstances approach and merely considered the nugatory factor to be an example of special circumstances. This was what he said at p. 51 of the report:

> The court has power to grant a stay, and this is entirely in the discretion of the court, but the discretion must be exercised in accordance with established principles. In the present case, the judgment was not a summary judgment or a judgment in default, but was a judgment which was given after a full trial, in which the court even has the benefit of submissions by eminent Queen's Counsel on both sides. In such cases in which an unsuccessful defendant has had a full opportunity to present his case, the court should not deprive a successful plaintiff of the fruits of his victory pending an appeal, unless the unsuccessful defendant can show some special circumstances to justify the granting of a stay: *Hong Leong Finance Bhd v. Hon Hoi Weng & Ors* [1987] 2 MLJ 377. An example of such special circumstances would be a situation in which it can be shown by affidavit that unless a stay is granted, a successful appeal could be nugatory. (Emphasis added).

Having laid out these general principles, I will now proceed to the heart of the matter. I will endeavour to examine all the points raised by the defendant in their attempt to seek a stay, not in its order of merit.

***Appeal Does Not Operate Automatically As A Stay Of Execution***

In exh. "AC1" of encl. 35, the defendant exhibited a notice of appeal to the Court of Appeal against my decision delivered on 1 September 1998 and argued that that would be a special circumstance to grant a stay. I beg to disagree. In *Wu Shu Chen (Sole Executrix of the Estate Of Goh Keng How, Deceased) v. Raja Zainal Abidin Bin Raja Hussin & Anor* [1996] 2 CLJ 353 at p. 355, I said:

> It is now trite that an appeal does not operate automatically as a stay of execution. This is clearly borne out by both section 73 of the Courts of Judicature Act, 1964 and rule 13 of the Rules of the Court of Appeal, 1994. Section 73 of the Courts of Judicature Act, 1964 provides that:
>
> > An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.
>
> Rule 13 of the Rules of the Court of Appeal 1994 provides that:
>
> > An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

NH Chan J (now JCA) in *Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd* [1989] 3 MLJ 40, 42 succintly said:

> An appeal does not operate as a stay of execution. See section 73 of the Courts of Judicature Act, 1964 (Rev 1972) which reads:
>
> 73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Supreme Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Supreme Court may direct.
>
> This is similar to the provisions of the English RSC Order 59, rule 13 (1). See also *17 Halsbury's Laws of England* (4th Edn) para 454 at page 272 which reads:
>
> > Except so far as the court below or the Court of Appeal may otherwise direct, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below, and no intermediate act or proceeding is invalidated by an appeal.

Alauddin Mohd. Sheriff J in *Perwira Affin Bank Bhd v. Hj. Zakaria Hj. Ismail & Ors* [1998] 2 CLJ 770, 772 was also of the view, quite rightly, that an appeal did not operate as a stay of execution.

On affidavit evidence, the plaintiff responded by filing encl. 42 – an affidavit in reply of Teh Ann Chung that was affirmed on 16 October 1998 and filed on 21 October 1998. At para. 4(a) of encl. 42 it was deposed that the filing of a notice of appeal would not operate, automatically, as a stay of execution. It was indeed a wise move for the plaintiff to depose in this direction and in this manner.

***Validity Or Correctness Of Judgment Cannot Be Considered As Special Circumstances***

It was argued by the defendant that the judgment of this court that was handed down on 1 September 1998 was challenged as to its correctness or validity. It was contended that the plaintiff did not take into account a sum of RM20,000 that was paid by the defendant. To be more specific in encl. 9 at para. 8, the defendant averred that they had paid all the sums due to the plaintiff amounting to RM185,000 – which included a payment of RM20,000 on 15 May 1998, and consequently there was no further sum due to the plaintiff. In response in encl. 11 of para. 5.2.1, the plaintiff deposed that the averment in encl. 9 at para. 8 was incorrect as the plaintiff had received a further payment by way of a cheque dated 20 May 1998 for the sum of RM20,000. The plaintiff even went to the extent of saying that the said cheque was duly honoured only on 29 May 1998. The plaintiff sought to explain that their solicitors had issued a notice of demand (exh. "TAC5" of encl. 7) against the defendant and because of that the cheque dated 20 May 1998 for RM20,000 was not reflected in that notice of demand. The plaintiff also deposed that by virtue of the contents of exh. "TAC5" of encl. 7, the last payment through cheque dated 20 May 1998 for the sum of RM20,000 by the defendant to the plaintiff was accepted on a without prejudice basis by the plaintiff. Put in another light, it was the plaintiff's stand as reflected in exh. "TAC5" of encl. 7 that any part of payment received by the plaintiff thereafter shall be accepted without prejudice to the plaintiff's claim for the debt as stated in that notice of demand. It must be emphasised that all these averments were not disputed nor challenged by the defendant. Thus, what was averred to in para. 5.2.1 of encl. 11 remained good and unchallenged and its truthfulness intact. Mr. Felix Dorairaj for the defendant had the audacity to argue that the plaintiff had "lied" to this court and that the plaintiff's claim was "surely fraudulent" and that the judgment sum was "dishonestly obtained". These are strong, harsh words employed, no doubt, to "hoodwink" this court. I must at once say that deception does not come easy and this court cannot be deceived by anyone. The affidavit evidence bears testimony to the fact that the plaintiff was entitled to the judgment sum. It is germane to mention that the defendant did not raise the issues of "fraudulent" or "dishonest" in their earlier affidavits. When the going got tough, the defendant became more

cunning. It was only in enclosure 35 – the affidavit in support of encl. 36, that the defendant raised for the very first time the issues of "fraudulent" and "dishonesty". The fact of the matter was this. That the defendant was completely ignorant of the payment of RM20,000 by way of a cheque dated 20 May 1998. It was the plaintiff who had disclosed this to the court. At any rate, it would be ideal to refer to exh. "AC3" of encl. 35 where the plaintiff's counsel in seeking payment for the judgment sum had deducted the sum of RM20,000 which was already paid by the defendant and the plaintiff did not seek to obtain any "double claim" for it. Furthermore, a perusal of the statement of claim would indicate that the plaintiff's claim was strictly based in accordance with the notice of demand as exemplified in exh. "TAC5" of encl. 7.

I am constrained to hold that challenging the validity or correctness of a judgment cannot be construed as special circumstances to warrant a stay. As Alauddin Mohd. Sheriff J said in *Perwira Affin Bank Bhd v. Hj Zakaria Hj Ismail & Ors (supra)* at p. 774 of the report:

> The applicants say there are merits in their appeal. I see no evidence in the affidavit to support this contention. The issues raised by the fourth defendant in his affidavit are substantially the same as those raised in the affidavit in opposition to the application for an order for sale by the respondent. I had earlier considered these issues at great length. It may well be that merits of the appeal is a relevant consideration but generally merits, strong grounds for appeal, correctness or otherwise of judgments are not special circumstances (See *Atkins v. GW Ry* [1986] 2 TLR 400).

In an illuminating judgment, NH Chan J (now JCA) said in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd (supra)*, particularly at p. 43, which must be considered to be good law:

> Similarly, in the case of a money judgment, where Order 47 rule 1 (1) applies, the court is not to have regard to the validity or correctness of the judgment but only to concern itself with the special circumstances which are relevant to the enforcement of the judgment; see per Lord Denning MR in *Trustees Ltd v. Darwen (Successors) Ltd* [1969] 2 QB 295 at page 302:
>
> > Mr. Lipfriend raised a further point. He said that under RSC Order 47 rule 1, there is power, in the case of a writ of *fieri facias*, or elegit, to stay [execution] proceedings if there are special circumstances which render it inexpedient to enforce the judgment or in case the applicant is unable from any cause to pay the money. ... The circumstances there again are circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness.

a See also *17 Halsbury's Laws of England* (4th Edn) [1976] para 451 at page 270 which reads: 'The special circumstances which entitle the court to stay execution of a money judgment are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness.' And the case which is cited in the footnotes in support of this rule is *TC Trustees Ltd v. FS Darwen Ltd* [1969] 2 QB 295.

b In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances. This is because, as was said by Lord Esher MR (at page 400) in *Atkins v. GW Ry* [1886] 2 TLR 400, 'strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so', or, as was put by Lord c Denning MR (at page 302) in *Trustees Ltd v. Darwen* [1969] 2 QB 295, those are matters which 'must be sought in the action itself, before judgment is given. It is too late to come after judgment. ... It is not permissible to renew it again on an application for a stay of execution'.

d Next, it was argued that the plaintiff had wilfully misled this court into granting the judgment for the plaintiff and for that reason the judgment was tainted with impropriety. Indeed these were serious allegations. It was a mischievous submission calculated to cast aspersion on the intergrity of this court. It was a contemptuous submission. It insults the intelligence of this court. As I said in *Wu Shu Chen (Sole Executrix Of The Estate Of Goh Keng* e *How, Deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor (supra)*, challenges against the incorrectness of the court's decisions in whatever forms cannot be considered as special circumstances.

***Unethical Means To Extract Judgment Sum Cannot Be Considered As*** f ***Special Circumstances***

It was argued that the plaintiff employed unethical means by copying the notice under s. 218(2)(a) of the Companies Act 1965 as reflected in exh. "AC2" of encl. 35 to all the defendant's banks.

g That act was said to amount to "blackmailing" the defendant. But one must not forget that by letter dated 7 September 1998 as reflected in exh. "AC3" of encl. 35, the plaintiff gave the defendant a grace period of seven days from the date of receipt to pay the judgment sum which the defendant was ordered to pay by this court. The defendant admitted receiving exh. "AC3" of encl. 35 but deliberately failed, ignored and/or refused to abide by the judgment of h this court. The defendant too did not dispute that exh. "AC2" of encl. 35 was issued after the expiry of the grace period as stipulated in exh. "AC3" of encl. 35. The defendant too did not dispute that at the time when exh. "AC2" of encl. 35 was issued, the defendant had not taken out any injunctive relief to restrain the plaintiff from commencing to take steps to wind-up the defendant. i Clearly therefore from these short narratives, it was the defendant's failure to

abide by the judgment of this court that had caused the plaintiff to pursue its enforcement remedies against the defendant. The defendant was the author of their own downfall. In fact it would be a correct assertion to say that the defendant was "highly unethical" by persistently and deliberately refusing to obey the order of this court. In law, there are no legal impediments for the plaintiff to issue exh. "AC2" of encl. 35 to all the defendant's banks in the manner in which the plaintiff did. At any rate, the conduct of the plaintiff was not unethical and even if it was so, it cannot be construed as a special circumstance to warrant a stay.

***Introduction Of New Documents – An Afterthought, Are Not Special Circumstances***

New documents were introduced for the very first time in encl. 35. These documents were not introduced earlier by the defendant when the latter was challenging the plaintiff's application for summary judgment. The defendant explained that these new documents were not available then. If that was so, why didn't the defendant seek an adjournment of the hearing of the plaintiff's application for summary judgment to enable the defendant to secure these documents and adduced the same? The defendant too had the audacity to say that they would seek leave from the Court of Appeal to adduce these fresh and new documentary evidences on the grounds that they were not available at the material time. These new documentary evidences sought to show that the judgment sums were excessive, contrary or against the weight of the available evidence. The Privy Council in *Tan Lai Wah v. First National Bank of Chicago* [1984] 1 MLJ 150, rejected the plea of *non est factum* that was raised by the appellant for the very first time some 15 months after the defence had originally been filed. In a short judgment this was what Lord Diplock said at p. 150:

> This is an appeal brought by a Chinese lady who had been a successful land broker for 17/18 years. The appeal is against a judgment for moneys payable under a guarantee of an overdraft entered into as long ago as 1974. The only defence persisted in before their Lordships was one of *non est factum* to the guarantee which was signed. It was first raised some 15 months after the defence had originally been filed. The learned trial judge surprisingly upheld that defence. His judgment was reversed by the Court of Appeal for reasons with which their Lordships can find no fault. Their Lordships would merely refer to the last sentence of the Court of Appeal's judgment on this particular issue:-
>
> > It is also our view that having regard to her long experience as a land broker and other spheres of business as previously set out – factors which the learned trial judge appeared to have not considered – her mere assertion that she thought the document she signed was one guaranteeing her a half share in [that parcel of land] was unbelievable.

> While paying a deserved tribute to the ingenious and seductive arguments advanced by Mr. Beveridge in an endeavour to uphold the judgment of the trial judge, their Lordships must nevertheless dismiss the appeal with costs.

Applying *Tan Lai Wah*, this court too must reject those new documents as it was too late in the day for the defendant to rely on them. As the saying goes, the court will only assist the vigilant and not the indolent.

Even if I am prepared to extend the court's indulgence and generosity to consider these new documents notwithstanding the fact that these new documents were improperly adduced, I cannot help but feel constrained to make the following brief observations:

(1) There was no documentary proof pertaining to the measurements and drawings of the plaintiff's works which had been completed as the defendant had earlier claimed that this was required before valuation could be done.

(2) The purported valuation of the plaintiff's works as seen in exh. "AC5" of encl. 35 was not dated, not certified by the consultant quantity surveyors and it did not state the basis upon which the valuation sums were derived. Yet, in the same breath the defendant had earlier claimed that the works must be verified by way of re-measurements and the drawings to be done by the consultant quantity surveyors before the amount due in respect of the works duly completed could be certified.

(3) In para. 8(iv) of encl. 35, the defendant deposed that various sums that have purportedly been valued and certified relate to those amounts under the contract between the defendant and the employer (Giant Cash & Carry Sdn Bhd). Furthermore, in para. 8(vi) of encl. 35, the defendant deposed that from the sums that have already been valued and certified in exh. "AC5" of encl. 35, the plaintiff's entitlements or claims were said to be those as set out in exh. "AC7" of encl. 35. But a perusal of exh. "AC7" of encl. 35 would show that the figures and amounts reflected therein were not certified at all by the consultant quantity surveyor. What is clear is this. That the alleged plaintiff's entitlements have been tabulated and derived arbitrarily by the defendant themselves. Then there was also no verification as to how the purported rates have been arrived at. The figures and the amounts seemed to have been snapped from the air.

These are some of the observations germane to the occasion and when taken in its proper perspectives, the defendant had no leg to stand on.

***Permanent Deprivation Of Moneys Paid Or Defendant Would Not Be Restored To Its Original Position Or Difficulty Of Recovering Moneys From Plaintiff Or Defendant Would Not Be In The Position To Re-imburse The Defendant Are Not Special Circumstances Even If The Defendant Succeeds On Appeal***

I have taken the liberty of itemising and considering all these points together as they are related to one another. It was the defendant's contention that a stay ought to be granted as there was every possibility that the plaintiff may not be in a position to return the moneys under the judgment sum. The answers to all these points can readily be gleaned from several authorities. Suffice for this exercise, that reference to some of them will now be made. For a start is the case of *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406 where at p. 407, Hashim Yeop Sani J (as he then was) said:

> From the affidavit of the applicant here it seems clear that the sole ground relied on as special circumstances is to be found in paragraph 5 of the affidavit which reads as follows:
>
> > I believe, it is imperative that a stay be granted as otherwise it will cause a permanent deprivation of money if the Plaintiff firm succeeds in the Appeal as there are merits in the Appeal in that there are points of law and facts for arguments.
>
> Based on past precedents and authorities this ground cannot be regarded as special circumstances to justify an order for stay. In my opinion the application here was misconceived and I accordingly dismissed the Motion with costs.

Then it would be the case of *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn Bhd* [1998] 2 AMR 1066 where at p. 1074, Mohd. Hishamudin Mohd. Yunus J said:

> I do, however, appreciate that if stay is not granted then in the event the defendant wins the appeal it would have been deprived of the opportunity of selling the shophouse to some other person at a higher price. But such a loss is purely a monetary loss and could be compensated or made good: the Court of Appeal, in the event it allows the appeal, can order the plaintiff to pay the defendant the difference in price.

Next, Abdul Kadir Sulaiman J in *Ban Lee Sdn Bhd v. Renganathan Narayanan* [1998] 3 CLJ Supp 425, especially at p. 427 to p. 428 succinctly said:

> It would be a sufficient ground for the stay of execution if the likelihood of an appeal, if successful, being rendered nugatory: *See Teow Guan & Ors. v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; [1995] 3 MLJ 598 CA. By nugatory it means that it would deprive the applicant in this case of the fruits if the result of the appeal is in his favour. In exercising my discretion in the nature of this application, it is incumbent upon me to consider whether

> if the applicant succeeds in its appeal against the order of the High Court, will it make the result useless and academic in the hand of the applicant? Will it in the true sense be deprived of the fruits of its litigation? The answers must be in the negative because the subject matter involved here is money or money's worth. It may be difficult for the applicant to recover the amount from the respondent but that is not sufficient to construe the result of the appeal as becoming nugatory. Legal remedies will be available to the applicant against the respondent to recover the amount. On the other hand, the respondent should not be deprived the fruits of his litigation for the reason that the applicant is unhappy with the decision of the High Court allowing the appeal of the respondent. The difficulty in the amount of money is not a special circumstance to justify the grant of this application as being nugatory. I also did not see the justification for the sum ordered to be deposited in court pending the outcome of the applicant's intended appeal. On the merit of the intended appeal of the applicant to the Court of Appeal, apart from saying so in its affidavit in support and the submissions made by its counsel, I have not been shown in what way that there is merit at all. On the contrary, by granting this application of the applicant, more hardship and injustice would be caused to the respondent.

Finally, in *Lebbey Sdn Bhd v. Chong Wooi Leong & Anor* [1998] 1 AMR 506. Abdul Wahab Patail J said at p. 514 of the report:

> The defendant's limited financial resources is a matter to take note of, but the court cannot deny the defendants, the exercise of a discretion of the court which would otherwise have been available to persons with financial resources. Justice should not depend on a person's means.

I am in accord with the views of my brother judges and I apply the principles enunciated therein vigorously to the factual matrix of the present case.

Undaunted the defendant argued that the plaintiff had omitted to produce proof of its financial standing and this court should conclude that the plaintiff was insolvent. But the onus was on the defendant's part, all along, to show to this court that the plaintiff was insolvent. I did say something to that effect in the case of *Wu Shu Chen (Sole Executrix Of The Estate Of Goh Keng How, Deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 especially at p. 356:

> I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000.00 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not insolvent and this assumption is clearly borne out by his affidavit in enclosure 45.

Reliance was placed by the defendant's counsel on s. 114(g) of the Evidence Act 1950 to argue that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. So, since the plaintiff withhold that evidence it must be construed against them, so ran the submission of the defendant's counsel. I am constrained to hold that the Evidence Act 1950 cannot be applied to affidavit evidence and this is explicitly borne out in s. 2 of the Act itself. Section 2 of the Evidence Act 1950 enacts as follows:

> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

At any rate the plaintiff has gone one step ahead. In encl. 42 of para. 5(r), the plaintiff has in a way showed its solvency. The plaintiff had shown that despite being wilfully deprived of the moneys due under the judgment sum that came up to more than RM300,000, the plaintiff by affidavit evidence had demonstrated that it had not faced any difficulty in carrying on its business. On this point, there was no contradiction by the defendant by way of affidavit evidence. But it was argued by the defendant that since the plaintiff was able to continue its business without the benefit of the judgment sum, then the defendant need not pay that judgment sum as the plaintiff would not be prejudiced. This argument was without merit. There is no proposition of law to say that pending an appeal the defendant is permitted to refuse to pay the plaintiff moneys under the judgment sum by reason of the failure of the plaintiff to prove its solvency. In any event, the plaintiff here has shown its solvency in encl. 42 of para. 5(r). The approach adopted by Abdul Kadir Sulaiman J in *Ban Lee Sdn Bhd v. Renganathan Narayanan (supra)* in regard to an application for stay of execution concerning money judgment as reproduced somewhere in this judgment serves as a useful guideline to follow.

For the reasons adumbrated above, I dismissed encl. 36 forthwith. Costs to be given to the plaintiff and it must be assessed.

a

b

**This page is intentionally left blank**

c

d

e

f

g

h

i